BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KYLA SHEPARD	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,038,153
EMBARQ CORPORATION	)	
Respondent	)	
AND	)	
	)	
XL SPECIALTY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the December 22, 2008, Preliminary Decision entered by Administrative Law Judge Marcia L. Yates Roberts.

ISSUES

This is a claim for a November 24, 2007, accident, which occurred while claimant was attempting to retrieve an earring allegedly at the direction of a supervisor, Ms. Irma Grizzard. In the Preliminary Decision Judge Yates denied claimant's request for benefits, reasoning:

> Claimant sustained injuries when she climbed over a railing in the atrium of Respondent's premises to retrieve an earring which had been dropped by a co-worker on the fourth floor. The injury occurred before Claimant had commenced her shift. After climbing over the railing she dropped to what she believed to be a ledge but was actually a sheet of plexiglass. The plexiglass would not support her and she fell to the lobby of the atrium sustaining lacerations to her leg.
>
> It is well established that for an injury to arise out of the claimant's employment, the injury must have some causal connection to the employment. Although this is not a strict requirement that the Claimant be injured while actually doing the work, it is enough if the risk leading to the injury is incidental to the work duties (*Martin v. USD 233*, 5 Kan. App. 2d 198 *[sic]*). But not every act during the course of employment gives rise to a risk associated with or incidental to employment (*Squires v. Emporia State University*, 23 Kan. App. 2d 325). In this

> case, the retrieval of the earring for her co-worker was personal in nature, and therefore, not compensable.
>
> Claimant's request for medical benefits is hereby denied.[1]

Claimant contends Judge Yates erred. First, claimant argues her accident arose out of her employment because her injury occurred while she was responding to a request from her supervisor. Next, claimant argues her employment exposed her to an increased risk of injury as respondent chose to paint the material that claimant fell through the same color as the surrounding structural steel. In other words, claimant contends her injury occurred due to the manner respondent's premises were constructed and the building's unsafe condition. Accordingly, claimant requests the Board to reverse the Preliminary Decision.

Conversely, respondent contends the Preliminary Decision should be affirmed. Respondent argues claimant's accident was not incidental to her work "and just because her close friend, Ms. Grizzard, was the senior person in the department on Saturdays, though not her reporting supervisor, this does not make it work-related."[2]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds as follows:

Respondent is a telecommunications company. Claimant, who is 22 years old, is employed by respondent as an analyst, who fields calls from customers, technicians, and other telecommunication companies regarding problems in respondent's circuits. Claimant uses a computer to test the circuits and determine where and what the problem might be.

On Saturday, November 24, 2007, claimant arrived at work approximately 15 minutes before her shift began and logged into her computer. Irma Grizzard, who is a close friend and co-worker, came over to claimant's desk and asked claimant to help her. Claimant and Ms. Grizzard, who was talking on a cell phone, then walked to the lobby area of the fourth floor. Ms. Grizzard looked down into the atrium and said that she had dropped her earring. The atrium was open to approximately the second floor.

When asked, Ms. Grizzard indicated that she wanted claimant to help retrieve the earring. Claimant then went to respondent's security guard, who was located on the first

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[1] ALJ Preliminary Decision (Dec. 22, 2008) at 1, 2.

[2] Respondent's Brief at 6 (filed Jan. 22, 2009).

floor of the building, and asked him for help retrieving the earring. Claimant and the security guard went to the second floor, where claimant climbed over a railing to retrieve what she thought was the earring. But when claimant dropped several feet from the railing to the surface below, that surface gave way and claimant fell into the first floor lobby. Claimant described her accident, in part:

> I took the elevator, walked down to the first floor, I got the security guard, and at that time he was sitting at his desk. I asked him if he could come help me retrieve an earring on the second floor.
>
> We then went to the elevator, rode it to the second floor. We went over to the right, where the landing was. We had looked over the balcony and I saw what I thought was the earring. I looked at him and I said, ["]Do you think it would be okay if I go and get this earring," and he said, "Yes, just as long as you're careful."
>
> At that time, I climbed over the railing, and there's a couple of steps that you have to take on the railing. I put my foot to the bottom step and I dropped down to when I thought I was going to land on something solid, and I just fell straight through.[3]

Claimant sustained severe lacerations to her left leg.

Irma Grizzard told a somewhat different version of the events leading to the accident. Ms. Grizzard testified she asked claimant how she (Ms. Grizzard) was going to get her earring back and that claimant then volunteered to go get the security guard. Accordingly, Ms. Grizzard believed the security guard would look for the earring and possibly prepare a report for maintenance on Monday. Ms. Grizzard acknowledged, however, that immediately before the accident claimant asked if Ms. Grizzard wanted her to get the earring and Ms. Grizzard responded, "If you can."[4] Ms. Grizzard testified:

> Well, I was still talking on the telephone with my sister, or rather listening to my sister, and I could also see where -- I did look over the railing and I could see where Kyla [claimant] and the security guard were. I could see heads. I could not see them, but I could see heads where they were pointing towards the -- possibly the earring.
>
> . . . .

[3] P.H. Trans. at 22.

[4] *Id.* at 51.

> Then Kyla said, "I think that's your earring over there. Is that it?" And I said, "Well, yeah, if it's an earring, it's mine." I think she said, "Do you want me to get it," and I said, "If you can." Her and the security [guard] had been talking and I couldn't -- I could not hear what they were saying.
>
> . . . .
>
> I was thinking that they had a plan of maybe getting a stick or something at that time and just kind of try to, you know, reel it in or something.[5]

Ms. Grizzard did not realize claimant intended to climb over the railing to retrieve the earring. Indeed, Ms. Grizzard had looked away from the atrium and had returned her attention to her telephone conversation. She did not see claimant climb over the railing or fall into the lobby through the faux floor.

Although Ms. Grizzard was not claimant's regular supervisor, at the time of the accident she was the person in charge and would have been considered claimant's supervisor.[6]

The security guard, Stephen Bropleh, prepared a report following the accident that indicated claimant called up to Ms. Grizzard before climbing over the railing and asked if she could go and get the earring.

The undersigned finds Ms. Grizzard was claimant's supervisor at the time of her accident. Moreover, had Ms. Grizzard not held that position the undersigned would not hesitate to affirm the Judge's finding that claimant's accident did not arise out of her employment. But the evidence establishes that claimant's accident occurred as claimant was performing a task for her supervisor under her supervisor's directions. That fact makes claimant's accident an incident of her employment. Therefore, claimant's accident is compensable under the Workers Compensation Act.

Only those accidents that arise out of and in the course of employment are compensable under the Workers Compensation Act.[7] Before an accident arises out of employment, there must be a causal connection between the accident and the nature, conditions, obligations, or incidents of the employment.[8]

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[5] *Id.* at 50-51.

[6] *Id.* at 53.

[7] See K.S.A. 2007 Supp. 44-501.

[8] See *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

> This court has had occasion many times to consider the phrase "out of" the employment, and has stated that it points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. . . .
>
> This general rule has been elaborated to the effect that an injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.
>
> An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment. . . . [T]he foregoing tests exclude an injury not fairly traceable to the employment and not coming from a hazard to which the workman would have been equally exposed apart from the employment.[9]

Because claimant's supervisor recruited claimant for her help in retrieving the lost earring, that activity became an incident of her employment. Accordingly, claimant's accident is directly traceable to her employment and, therefore, it is compensable under the Workers Compensation Act.

Respondent has cited several cases in which the worker was denied workers compensation benefits because the accident did not arise out of the worker's employment. In none of those cases, however, was the worker injured while performing a task that a supervisor had directed them to perform.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned reverses the December 22, 2008, Preliminary Decision and finds claimant's November 24, 2007, accident arose out of and in the course of her employment with respondent. Accordingly, this claim is remanded to the Judge for further proceedings to address claimant's request for medical benefits.

IT IS SO ORDERED.

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[9] *Siebert v. Hoch*, 199 Kan. 299, 303-304, 428 P.2d 825 (1967) (citations omitted).

[10] K.S.A. 44-534a.

Dated this ____ day of February, 2009.

KENTON D. WIRTH
BOARD MEMBER

c: Steven J. Borel, Attorney for Claimant
Daniel N. Allmayer, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge